LIBRARY
SUPREME COURT, U S

Supreme Court, U.S.
FILED
AUG 3 1970
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 490

RICHARD B. OGILVIE, Individually and as Governor of the State of Illinois,

Petitioner,

v.

LESTER H. JACKSON, BRENETTA M. HOWELL, JESSIE ~~M. MADISON~~, ALFRED L. PORTIS, RICHARD J. BARNETT, L. ROSCOE BOLER, and RICHARD CRILEY, on behalf of themselves and all others similarly situated,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

WILLIAM J. SCOTT,
Attorney General of the State of Illinois,
160 North La Salle Street, Suite 900,
Chicago, Illinois 60601 (793-3500),

JOHN GALVIN,
Assistant Attorney General of the State of Illinois.

Counsel for Petitioner.

Printed by Authority of the State of Illinois

INDEX

	Page
The Opinion Below	2
Jurisdiction	2
Questions Presented	2
Statutory Provisions	3
Statement of the Case	4
Reasons for Granting the Writ	6
Conclusion	13
Appendix A—Schedule of Statutes—Constitutional Provisions	15
Appendix B—Opinion of the United States Court of Appeals for the Seventh Circuit, entered on May 6, 1970	19
Appendix C—Order of the United States District Court of June 12, 1970	30
Appendix D—Order of the United States District Court of March 16, 1970	34
Appendix E—Application for stay	36

Table of Cases

Baker v. *Carr*, 82 S. Ct. 691, 369 U.S. 186 ..... 2, 8, 9

Creager v. *Bryan*, 287 F. 362 (1922) 7

Fineran v. *Bailey*, 2 F. 2d 363 7

Knapp v. *Lake Shore Ry. Co.*, 197 U.S. 536 7

Luther v. *Borden*, 48 U.S. 1 10

Mann v. *Powell*, N.D. Ill. E.D. No. 69 C. 2235, No. 1359 U.S. Supreme Court, October Term 1969 9

Marbury v. *Madison*, 1 Cranch 137 7
People v. *Bissell*, 19 Ill. 229 12
People v. *Dunn*, 258 Ill. 441 12
Rosenbaum v. *Bauer*, 120 U.S. 450 7
U. S. ex rel. v. *Black*, 128 U.S. 48 7
Ury v. *Santee* (N.D. Ill. Ed. 1969) 303 F. Supp. 119 9
Weisberg v. *Powell*, 417 F. 2d 388 ..... 7, 8, 9
Williams v. *Rhodes*, 393 U.S. 23 11

STATUTES CITED

United States Code:
2 U.S.C. § 8 ..... 3, 10
28 U.S.C. § 1343 ..... 2, 3, 6, 7
28 U.S.C. § 1344 ..... 3, 6
28 U.S.C. § 1361 ..... 3, 7
28 U.S.C. § 1651 (a) 4, 6, 7
28 U.S.C. § 2201 ..... 4, 6, 7
28 U.S.C. § 2202 ..... 4, 6, 7
42 U.S.C. § 1981 4
42 U.S.C. § 1983 ..... 2, 4, 7
42 U.S.C. § 1988 4

United States Constitution:
Article I, § 2 ..... 3, 4, 10
Article I, § 4 ..... 3, 10
Ninth Amendment 3, 4
Fourteenth Amendment 3, 4
Twentieth Amendment, § 2 3

Illinois Revised Statutes, Ch. 46, Art. 25 § 25-7 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. ——

RICHARD B. OGILVIE, Individually and as Governor of the State of Illinois,

Petitioner,

v.

LESTER H. JACKSON, BRENETTA M. HOWELL, JESSIE M. MADISON, ALFRED L. PORTIS, RICHARD J. BARNETT, L. ROSCOE BOLER, and RICHARD CRILEY, on behalf of themselves and all others similarly situated,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

---

The petitioner, Richard B. Ogilvie, Governor of the State of Illinois, respectfully prays that a writ of certiorari issue to review the judgment and Opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on May 6, 1970.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix together with the Order of the United States District Court for the Northern District of Illinois, Eastern Division of June 12, 1970.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on May 6, 1970 and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Where the Governor of a State is the sole defendant and the relief requested is "a mandatory injunction requiring the Governor of Illinois to issue a writ of election to fill a vacany in the United States House of Representatives"[1]

   (a) is the action an original proceeding for a writ of mandamus beyond the statutory jurisdiction of the inferior courts of the United States? Or,

   (b) is the action cognizable under the original jurisdiction conferred by 28 U.S.C. § 1343 and by 42 U.S.C. § 1983?

2. In the alternative (assuming Mandamus jurisdiction arguendo), does the "political question doctrine" (*Baker* v.

---

1. Quoted from paragraph one, page one of the opinion of the United States Court of Appeals for the Seventh Circuit May 6, 1970.

Carr, (1962) 369 U.S. 186) permit judicial cognizance of this case to interpret the meaning and effect of the United States Constitution Article I §§ 2 and 4, the Twentieth Amendment; § 2, and 2 U.S.C. § 8; or otherwise stated, is the subject matter non-justiciable by virtue of the express commitment of the issue to a coordinate political department towit: the Congress by Article I § 4 which has been acted upon by the Congress in 2 U.S.C. § 8?

3. In the alternative, (assuming Mandamus jurisdiction and justiciability arguendo) does the United States Constitution in its pertinent parts and the statute cited allow discretion to State authorities to forego filling a vacancy in the House of Representatives; or, otherwise stated, is virtual representation constitutionally sufficient and actual representation not required when regard is had to the length of the unexpired term, the law of the State, the pendency of the next general election, the assembling of the Congress and the cost of the special election relative to the unexpired term?

STATUTORY PROVISIONS INVOLVED

United States Constitution
- Article I, § 2
- Article I, § 4
- Ninth Amendment
- Fourteenth Amendment
- Twentieth Amendment, § 2

United States Code
- 2 U.S.C. § 8
- 28 U.S.C. § 1343
- 28 U.S.C. § 1344
- 28 U.S.C. § 1361

28 U.S.C. § 1651(a)
28 U.S.C. § 2201
28 U.S.C. § 2202
42 U.S.C. § 1981
42 U.S.C. § 1983
42 U.S.C. § 1988
Illinois Constitution
Article III

Illinois Revised Statutes
Chapter 46 Article 25 § 25-7.

STATEMENT OF THE CASE

Respondents (Plaintiffs below) are qualified electors of the sixth congressional district of Illinois. They filed the subject action for "equitable and declaratory relief" on December 16, 1969, in the United States District Court for the Northern District of Illinois. Respondents asserted jurisdiction by force of 28 U.S.C. 1343 and that their cause of action arose under Article I, § 2, clause 4 of the United States Constitution, the Ninth and Fourteenth Amendments, 42 U.S.C. §§ 1983 and 1988, and 28 U.S.C. §§ 2201 and 2202. The antecedent facts upon which the cause was premised are as follows:

On November 5, 1968, the Honorable Daniel Ronan was duly elected to the office of representative to the Congress of the United States from the Sixth Congressional District of Illinois. He was, on January 3, 1969, sworn and seated in the House of Representatives and served until his death, on August 13, 1969, caused the subject vacancy. The respondents did, in effect, petition the defendant Governor to issue a special writ of election to fill the vacancy. The Governor failed to issue a writ. Under the time schedules pro-

vided by election laws of Illinois, a period of one-hundred sixty-two (162) days is required from the date of issuance of an election writ to the holding of the election to allow for nominations, a primary, certification of primary results and election and all incidental functions. Had the Governor acted immediately on August 14, 1969, the special election to fill the vacancy would have been held on January 23, 1970. The elected representative would have served a vacant unexpired term of less than one year and more than eleven months. The cost of such special election was estimated by the office of the county clerk of Cook County to be $400,000. In failing to call the special election, the Governor acted on the theory that he had a full and complete discretion in the matter under law and in the exercise of such discretion adopted a policy of not calling special elections where a vacancy could not be filled for at least one year.

On March 16, 1970, the District Court dismissed the action, stating *inter alia*, "This court does not find that the relatively short period in which the Sixth District will remain unrepresented raises any questions of denial of due process or equal protection guaranteed by the Fourteenth Amendment sufficient to invoke this court's jurisdiction."[2] (See Appendix D for full text.) Respondents appealed to the United States Court of Appeals for the Seventh Circuit which entered judgment and opinion on May 6, 1970, reversing the judgment below and remanding for further proceeding consistent with the opinion. (Appendix B)

In response to the mandate, the District Court, on June 12, 1970, entered summary judgment for Respondents, con-

---

2. This is the language of the District Court—not ours!

cluded that the Governor's refusal to issue a writ of election was unconstitutional and directed the Governor to call a "special general election"[2] on November 3, 1970) (the date of the 1970 general elections) and further directed the Governor to certify upon election the candidate then chosen "to be the duly elected representative . . . both for the remainder of the term of the 91st Congress and for the full succeeding term of office" (Appendix C)

On July 20, 1970, the Court of Appeals denied petitioner's application for stay pending determination of this petition for certiorari (Appendix E). Senior Circuit Judge John Hastings dissented.

REASONS FOR GRANTING THE WRIT

1. Under Civil Rights statutes, inferior federal courts have, without congressional authorization or pronouncement of this Court, assumed original jurisdiction to mandamus state officers by means of unwarranted extension of equitable powers incident to the limited jurisdiction conferred by 28 U.S.C. § 1343. There is great immediate need for this Court to settle these jurisdictional questions which are apparent when the jurisdictional statute re mandamus, 28 U.S.C. § 1361; and all the writs statute, 28 U.S.C. § 1651, are put in juxtaposition to 28 U.S.C. § 1343, Civil Rights and elective franchise, as and if modified by 28 U.S.C. § 1344, Federal jurisdiction of election disputes, and 28 U.S.C. §§ 2201 and 2202, declaratory judgment.

The cause in this suit is plainly mandamus; to obtain "a mandatory injunction requiring the Governor of Illinois to issue a writ of election." The only relief applicable in this case is the common law writ of mandamus. Mandamus is *sui generis*. Congress limits original district court jurisdica-

tion "of any action in the nature of mandamus to compel" to "an officer or employee of the United States or any agency thereof." This express grant of original mandamus jurisdiction negates the notion that federal courts otherwise have original mandamus jurisdiction under the equitable powers incident to civil rights and elective franchise. *Marbury* v. *Madison*, 1 Cranch 137; *Creager* v. *Bryan*, 287 F. 362 (1922); *Knapp* v. *Lake Shore Ry. Co.*, 197 U.S. 536; *Rosenbaum* v. *Bauer*, 120 U.S. 450; *Fineran* v. *Bailey*, 2 F. 2d 363.

In *Weisberg* v. *Powell*, 417 F. 2d 388 the Court of Appeals had recourse to the all-writs statute to justify mandamus determining the duty and its performance in one and the same litigation. That court does so again here. In both cases, they overrule *U.S. ex rel. v. Black*, 128 U.S. 48. Tested by the prerequisite underlying the last clause of 28 U.S.C. 1651(a)—"agreeable to the usages and principles of law"—this action from its inception has been wholly beyond the original jurisdiction of the inferior federal courts.

Yet these courts continually and improperly coerce State action by virtue of 28 U.S.C. § 1343 and 42 U.S.C. 1983 relying upon the fact that equitable relief is allowable in the latter statute to read mandamus jurisdiction into the former. This is either the zenith of judicial process or the nadir of failure of judicial restraint. It poses the question: where is the line to be drawn between judicial activism and outright legislation by the courts?

We may also ask: why the necessity of 28 U.S.C. section 1361 if mandamus is not descriptive of the subject matter of the action? 28 U.S.C. sections 2201, 2202, and 1651(a), have sufficient latitude to authorize affirmative remedial actions, where jurisdiction is otherwise established.

In the proper course of constitutional litigation, such cases may reach this Court through the state judiciaries. Federal district courts, by exceeding the proper limitations of civil rights jurisdiction, are engaged in "a cafeteria line of judicial service" (To use Judge Hasting's apt phrase) which proliferates litigation. Not only do the inferior courts play fast and loose with mandamus jurisdiction, they encourage cases alleging deprivation of rights under 'color of law' to such an extent that any allegation of denial of "due process" and "equal protection of laws" has become an 'open sesame' to original jurisdiction in district courts. Jurisdiction should be restricted to cases where plaintiffs' civil rights exist anterior to and independent of the alleged breach.[3] Jurisdiction should not spontaneously generate out of a mere alleged breach of the great generalities of the Fourteenth Amendment.

How persons can be deprived of *secured* civil rights prior in time to their judicial pronouncement, "puzzles the will" to defer to the wisdom of district courts which can find no pathways in the political thicket without express guidance of this Court.[4]

2. The "political question doctrine" of *Baker* v. *Carr* in its application by inferior courts to more and more local

---

3. Anterior and independent in the sense of being a right among those secured by the Bill of Rights, federal statutes, case precedent, or fundamentally anterior to the Constitution.

4. At the conclusion of the hearing in *Weisberg v. Powell*, the district court stated: "The Court: Well, gentlemen, I am of the opinion that the Supreme Court has put us in the political picture. Therefore, I rule that I do have jurisdiction."

political problems confuses standards of federalism to an extent requiring further definition of the "political question doctrine" by this Court in the exercise of its power and responsibility of supervision.

The constitutional commitment of the subject matter of this case to congressional regulation seems to clearly demonstrate its inappropriateness for judicial consideration. Yet the Court of Appeals opinion summarily disposed of this issue by an ipse dixit declaration of justiciability (Appendix B, page 3). The Court below identifies the right to actual representation with the right to have a special election called, finds them to be synonymous, and equates these rights with the right to vote. Under the great generalities of "due process" and "equal protection" impelled by the concept of egalitarianism, there appears to be no limit to judicial identification of duties, judicial determination of breaches, and the molding of judicial protections. [(See *Ury* v. *Santee* (N.D. Ill. Ed. 1969) 303 F. Supp. 119 and *Weisberg* v. *Powell*. (C.A. 7, 1969) 417 F. 2d 388 and *Mann* v. *Powell*, N.D. Ill. E.D. No. 69 C 2235, No. 1359 Supreme Court of the United States, October Term, 1969)]. We accordingly submit that further definition of the "political question doctrine" as it effects subject-matter justiciability is of wide import to cases involving elections and election disputes where "race, color or previous condition of servitude" is nowise in issue. Such further definition may find an appropriate vehicle in this case with a view toward preventing the inundation of dockets of the federal judiciary by political litigations. The revitalization of the principles of judicial restraint and federalism is needed.

Baker v. *Carr* endorses the viability of the "political question doctrine" as "essentially a function of the separa-

tion of powers.'" Thus, we meet the first and primary test of "a textually demonstrated constitutional commitment of the issue to a coordinate political department." Petitioner suggests that this case should be treated as cases under the guaranty clause are traditionally treated, the right to decide being placed in Congress and not in the courts. *Luther* v. *Borden*, 48 U.S. 1. If there is a right to actual representation, would it not be appropriate to tolerate the temporary absence of it in deference to the constitutional right of Congress to fashion a solution by sufficient regulation.

3. The meaning and effect of Article I of the United States Constitution on the subject of vacancy in the House of Representatives presents a threshold constitutional question which has not been, but should be, settled by this Court. (Assuming, jurisdiction and justiciability.)

Senior Circuit Judge Hastings in dissenting, in part, below says, "The majority opinion undertakes to resolve with finality the meaning and applicability of Article I, § 2, clause 4 and Article I, § 4 of the Federal Constitution as well as Title 2, U.S.C. § 8, together with 46 Ill. Rev. Stats. 25-7."

The opinion of the Circuit Court of Appeals will stand as a non-definitive resolution of fundamental constitutional questions if this Court does not grant the writ.

The importance of these questions have dimensions far greater than this case, beyond the parties plaintiff, the one Governor, the one congressional district and the one vacant seat in Congress. A final determination of this case will effect the Executive Authority and legislatures of the fifty States, the separate power of Congress and the entire franchised citizenry of the Republic. These questions will be continuing questions because vacancies are inevitable.

These brief remarks present compelling reasons for granting the writ. Yet we are here because an absolutist view read the text—"the Executive Authority thereof shall issue Writs of Election to fill such vacancies"—as mandatory and subject to literal interpretation within unavoidable limits.

On scrutiny, safely assuming election schedules in other states to be similar in duration to those of Illinois and fair and reasonable, (in this respect, consistent with the recent opinion of this Court in *Williams* v. *Rhodes*, 393 U.S. 23), the opinion below, from another view point, does not require a writ to issue where up to 7 months remain in a term when a vacancy occurs. The mandatory language is reconciled to political reality. Article I, § 2, clause 4 is not, never was and never can be absolutely mandatory and literally enforced because there must be election schedules, conforming with equal protection.

We must consider, since the issuance of a writ of election by Executive Authority is not absolutely mandatory by virtue of the latent paradox in clause 4, to what extent, if any, is that clause further constitutionally qualified by § 4 of Article I. We submit that this Court should settle the area in which virtual representation is constitutionally permissible in the event of a vacancy in the House of Representatives (if the matter be justiciable) because actual representation cannot be maintained in the event of a vacancy nor can it be always be reestablished during the unexpired term, and in its absence, virtual representation does suffice and is of necessity constitutional.

This case is not a minor variation on the theme of *Williams* v. *Rhodes*. It is distinguishable. Here, there is no "invidious distinction." Petitioner's theory, and now declared

policy, determines the exercise of discretion to call a special election with uniformity without regard to the congressional districts involved and before the occurrence of events uncontrolled by his executive authority i.e., the death, resignation or removal of any given representative. Accordingly, it does not invidiously deny equal protection to any predefined class of persons or political groups. This is not a reapportionment case nor properly analagous to such a case. The right to hold an election within a State is a distinct proposition with a different tradition and history.

The Congress, consistent with the relevant constitutional provision and eschewing the right to regulate, has left the time for holding elections to fill a vacancy to "the laws of the several states." The State Statute appears to mandate a call of special election forthwith. But as demonstrated it also, necessarily, cannot be absolutely mandatory and literally enforced. Indeed, under Illinois law, the statute must be held to be permissive. Under the doctrine of separation of powers required by Article III of the Illinois Constitution the Governor cannot be compelled to perform a duty by Mandamus (*People* v. *Bissell*, 19 Ill. 229; *People* v. *Dunn*, 258 Ill. 441). We must credit the Illinois legislature with knowledge of this fact. Thus, in practical effect, the Governor's policy is the law on the subject matter and is authorized by Article I, § 4 of the United States Constitution and it has not been proscribed by congressional regulation.

CONCLUSION

We have given the reasons for granting the writ in order of importance. The questions presented are in their proper order of importance. The third question is the easiest to deal with. Congress should have no difficulty with it once it is brought to its attention. That consideration goes far toward determination of the second question of justiciability. The first question of jurisdiction is of first and vital importance.

Accordingly, we respectfully urge that these questions be taken and that a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit. Time is of the essence. If the case is not held to be a continuing controversy capable of repetition, it will be moot on November 3, 1970. In the alternative, we ask the Court to prefer this case and decide it before that date.

Respectfully submitted,

WILLIAM J. SCOTT,
Attorney General of the State of Illinois,
160 North La Salle Street, Suite 900,
Chicago, Illinois 60601 (793-3500),

JOHN GALVIN,
Assistant Attorney General of the
State of Illinois.

Counsel for Petitioner.

APPENDIX A

The Constitution of the United States

Article I section 2—"When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such vacancies."

Article I section 4—"The Times, Places, and Manner of Holding Elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof, but the Congress may at any time by law make or alter such regulations."

Article I section 4—"The Congress shall assemble at least once in every year."

Ninth Amendment—"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Fourteenth Amendment; Section 1.—"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Twentieth Amendment; section 2—The Congress shall assemble at least one in every year and such meeting shall begin at noon on the third day of January."

United States Code

2 U.S.C. section 8—Vacancies

"The time for holding elections in any state for a Representative to fill a vacancy, whether such va-

cancy is caused by a failure to elect at the time prescribed by law, or by death, resignation, or incapacity of the person elected, may be prescribed by the laws of the several states."

28 U.S.C. section 1343

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: (1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42; (2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent; (3) To redress the deprivation, under color of any State Law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States; (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

28 U.S.C. section 1344

"The district courts shall have original jurisdiction of any civil action to recover possession of any office, except that of elector of President or Vice President, United States Senator, Representative in or delegate to Congress, or member of a state legislature, authorized by law to be commenced, wherein it appears that the sole question touching the title to office arises out of denial of the right to vote, to any citizen offering to vote, on account of race, color, or previous condition of servitude.

"The jurisdiction under this section shall extend only so far as to determine the rights of the parties to office by reason of the denial of the right, guaranteed by the Constitution of the United States and secured by any law, to enforce the right of citizens of the United States to vote in all the States."

28 U.S.C. section 1361

"The district court shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

28 U.S.C. section 1651(a)

"(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

28 U.S.C. section 2201

"In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

28 U.S.C. section 2202

"Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment."

42 U.S.C. section 1981

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as it enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

42 U.S.C. 1983

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Illinois Constitution

Article III—"The powers of the government of this State are divided into three distinct departments—the legislative, executive and judicial; and no person, or collection of persons, being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted."

Illinois Revised Statutes

Chapter 46—Elections—Article 25—Resignations and Vacancies—section 25-7—Representative in Congress.

"When vacancy shall occur in the office of representative in Congress from this state, the Governor shall issue a writ of election to the county clerks of the several counties in the district where the vacancy exists, appointing a day to hold a special election to fill such vacancy."

APPENDIX B

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1969 — APRIL SESSION, 1970

No. 18388

LUSTER H. JACKSON, BRENETTA M. HOWELL, JESSE D. MADISON, ALFRED L. PORTIS, RICHARD J. BARNETT, L. ROSCOE BOLER and RICHARD CRILEY, on behalf of themselves, and all others similarly situated,

Plaintiffs-Appellants,

v.

RICHARD B. OGILVIE, individually and as Governor of the State of Illinois,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

MAY 6, 1970

Before Swygert, *Chief Judge*, Hastings, *Senior Circuit Judge*, and Fairchild, *Circuit Judge*.

Fairchild, Circuit Judge. Plaintiffs brought an action for a mandatory injunction requiring the Governor of Illinois to issue a writ of election to fill a vacancy in the United States House of Representatives. On March 16, 1970, the district court dismissed the action for want of jurisdiction. Plaintiffs appealed and this court expedited the appeal.

Plaintiffs averred that they are qualified electors of the sixth congressional district of Illinois and that they bring the action on behalf of all other such electors as well; that on August 13, 1969, the Honorable Daniel Ronan, Representative from that district, died; that defendant, the Honorable Richard B. Ogilvie, Governor of Illinois, has failed and refused to issue a writ of election to fill the vacancy. Plaintiffs also averred that the former Representative from the thirteenth congressional district of Illinois resigned May 25, 1969, the Governor issued a writ of election May 27, and a new Representative was elected November 25, 1969 and is now serving.

Plaintiffs point to Article I, § 2, clause 4 of the Constitution of the United States, providing: "When vacancies happen in the Representation from any state, the Executive authority thereof shall issue writs of election to fill such vacancies."

In brief, it is the theory of plaintiffs that they have a right, created by the federal constitution, to representation in the House of Representatives notwithstanding the death of the Representative elected from their district for the current term; that the quoted clause 4 imposes a duty and does not merely confer authority; and that defendant, as Governor, is acting under color of state law in depriving them of such right. Jurisdiction would follow under 28 U.S.C. § 1343(3). Plaintiffs also assert that defendant's failure to call a special election in their district denies them equal protection of the laws.

The Attorney General raises several points on behalf of defendant. He asserts that the applicable Illinois statutes require a lapse of at least 162 days from the call to the

election.[1] If the Governor had, on August 14, 1969, called a special election, the earliest possible date of election would have been January 23, 1970, leaving more than eleven months but less than a full year in which the newly elected Representative might serve. The Attorney General suggests that the Governor was exercising his executive discretion to draw the line at one year. The Attorney General further asserts that the people have no inherent right to hold an election; that the regulation of the matter is for the legislature, not the courts; that the question is political, not justiciable; that clause 4 is merely directory; that there is no available remedy, mandatory injunction, mandamus, and declaratory relief each being inappropriate. The Attorney General has admitted plaintiffs' averments of fact above set forth except for the qualifications of plaintiffs as residents and electors. He asserts that in fact a special election would cost about $400,000.

The district court, in deciding that it had no jurisdiction, apparently measured the substantiality of plaintiffs' rights in terms of time, for it said: "This Court does not find that the relatively short period in which the Sixth District will remain unrepresented raises any questions of denial of due process or equal protection guaranteed by the Fourteenth Amendment sufficient to invoke this Court's jurisdiction."

We do not share the view that the length of time remaining for possible service when the district court spoke,

---

1. Plaintiffs have not challenged this computation nor the validity of the statutes which provide for it. As will be seen, control of this element of procedure has been left to the state legislatures.

on March 16, was *de minimis*. An election called March 16 could have been held August 25, leaving four months during which the successor might have served.[2]

We have no doubt but that the complaint stated a cause of action for deprivation of a right secured by the constitution, the district court had jurisdiction thereof and power to afford a suitable remedy, and the claim is justiciable.

The right to have district boundaries drawn so that there shall be "equal representation for equal numbers of people" in the House of Representatives, and the propositions that the district courts have jurisdiction of lawsuits to secure that right, that electors have standing to sue, and that the claims are justiciable are well settled.[3] The right is derived primarily from the provisions of Article I, § 2 that Representatives be "chosen every second Year by the People of the several States" and for apportionment among the states, read in the light of the history of the Great Compromise, by which "in *one* branch the *people*, ought to be represented; in the *other*, the States."[4]

"No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other

---

2. It should be pointed out that none of the delay up to March 16 can be charged to the district court. The plaintiffs did not bring their action until December 16. Their counsel explains that they are poor people, unable to proceed until they could obtain counsel without expense to them. Defendant did not appear to defend the action until February 18. His counsel explains that the summons and complaint were mislaid after service and were first brought to the attention of an executive assistant six

rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right."[5]

Plaintiffs' claim that they are being deprived of a right of representation is sufficient for jurisdictional purposes. They also claim denial of equal protection of the laws. Challenges on that ground to state laws regulating the appearance on the ballot of new party or independent candidates for presidential elector have been held justiciable.[6]

One district court has held, finding a similarity with apportionment cases, that it has jurisdiction of a claim of electors that failure of local officers to call a special election to fill vacancies in their city council is a denial of equal protection of the laws.[7]

The issue at the heart of the instant case is whether the constitutional provision that when vacancies happen the Executive authority of the state "shall issue writs of election to fill such vacancies" is mandatory. The language is mandatory according to the ordinary meaning of its terms. We find no persuasive reason for reading it in a directory sense. Indeed it serves to make clear that the

---

weeks later after a telephone call from plaintiffs' counsel. The district court acted promptly after the parties submitted briefs.

3. Wesberry v. Sanders (1964), 376 U.S. 1.

4. Wesberry, p. 13.

5. Wesberry, p. 17.

6. Williams v. Rhodes (1968), 393 U.S. 23; Moore v. Ogilvie (1969), 394 U.S. 814.

7. Hackett v. President of City Council of City of Phila. (E.D. Pa., 1969), 298 F. Supp. 1021, 1026, aff'd on another point, 410 F. 2d 761.

people's right to chosen representation is not limited to exercise at a biennial election, but is a continuing right which is not to be defeated by death of a Representative once chosen, or other cause of vacancy.

In a debate in the House of Representatives in 1804 concerning the validity of a special election questioned on the ground of shortness of notice, Representative Findley stated in support of the prompt holding of the election (held five months before the expiration of the term) that, "[t]he Executive shall issue writs, in the language of command; it renders the issuing of the writs an indispensable duty."[7a]

The Attorney General points out that Article I, § 4 provides: "The times, places and manner of holding elections for senators and representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations. . . ." Congress has provided in 2 U.S.C. § 8 that the time for holding an election for a Representative to fill a vacancy may be prescribed by the laws of the state

There has been no challenge to the propriety of the Illinois laws which require a total period of 162 days from call to special election. Such provisions would render it useless for the Governor to issue a writ of election where the vacancy occurred 162 days or less before the end of a term, and might well excuse issuance where the vacancy occurred earlier but where the period of possible service could truly be deemed *de minimis*. Except in those in-

---

7a. Quoted in M. St. Clair Clarke and David A. Hall, Cases of Contested Elections (Washington, D.C. 1834), the Case of John Hoge of Pennsylvania, at page 139.

stances the delegation to the state legislature of this power over procedure does not, in our opinion, alter the character of the Governor's duty to issue a writ of election.

Although the state legislatures are not empowered to decide whether or not a vacancy in the office of Representative is to be filled, we note that the Illinois statutes have provided for many years that when such a vacancy occurs, the Governor "shall issue a writ of election" to the county clerks of the appropriate counties.[8] On November 14, 1917 the Attorney General of Illinois advised the Governor, with respect to a vacancy in the office of Representative, "In this instance, a public right is involved . . . the right of the people of the congressional district to be represented in the House of Representatives in Congress. To hold that the word 'shall' is directory, merely, is to put it within the power of the Governor to deprive the people of the congressional district of that right."[9]

We hold that defendant had the duty, at the time of the death of Representative Ronan, to issue a writ of election to fill the vacancy. The fact that an election could not be held until January 23, 1970 and that the successor could have served little more than eleven months at the most, would not, in our opinion, justify failure to issue the writ. The Governor's duty, we think, continued, notwithstanding the fact that delay may eventually render the calling of a special election of so little use that the duty will no longer be enforceable.

The judgment of the district court was founded on an erroneous premise of lack of jurisdiction, and unless the

---

8. 46 Ill. Rev. Stats. § 25-7.

9. Biennial Report of the Attorney General of Illinois, 1917-18, p. 315, 316, Opinion No. 5007.

passage of additional time has rendered the controversy moot, the judgment must be reversed and the cause remanded.

We note that a general election will be held November 3, 1970, and that a Representative will then be elected for the term beginning January 3, 1971. We are not aware of any reason why a special election could not be held the same day for a Representative to fill the vacancy for the balance of the term which began January 3, 1969. Such a special election (and the primary which would have to precede it) could be called as late as May 25. We are not prepared to say as a matter of law that representation from the time the results of the November 3 election will be determined to January 3, 1971 is *de minimis*.

It follows that the district court should proceed to determine the merits and formulate its decree as expeditiously as possible.

The Attorney General questions the remedy which the district court has the power to employ. We conclude that it is not limited in its choice of an appropriate remedy by the fact that defendant is the Governor of a state. 42 U.S.C. § 1983 broadly authorizes an action at law, suit in equity, or other proper proceeding for redress of the deprivation of rights suffered by plaintiffs.[10]

If the district court determines on the basis of evidence presented on remand of this case, that relief in the form of a mandatory injunction is not proper, the controversy between the parties will, nevertheless, not become moot. Plaintiffs are still entitled to a declaratory judgment that the defendant has breached his duty under Article I, § 2, Clause 4 of the constitution to call a special election. Controversies of this type in the election field are peculiarly "capable of repetition, yet evading review."[11]

We are mindful that in cases involving legislative redistricting, courts have not enjoined or issued mandamus to a legislature, but after declaring that the duty exists, and given an opportunity to perform it, have formulated districts by judicial decree in the even of continued failure of the legislature. The legislature is a large deliberative body, and presumably has open to it choices among several legitimate plans of districting.

But in the case of a Governor's failure to issue the writ of election, we think a mandatory injunction would be appropriate. The Governor is an individual officer. The key question is whether the Governor has discretion to refuse to call a special election. Once it has been determined that he does not, and that plaintiffs are being deprived of a right secured by the constitution, the district court has the power necessary to give redress. Redress, in this instance, requires affirmative action and the same may be compelled by mandatory injunction.[12]

In performing the duty established in Article I, § 2 Clause 4 the defendant does not have discretion to decide against filling the vacancy. His discretion in calling a special election is limited. For instance he may prefer one day of the week over another, or cause the special election to coincide with or to avoid being held on the same day as another election. If the district court determines that affirmative relief should be granted, a decree should be framed in a manner which will preserve defendant's latitude and discretion in these matters.

---

10. See Sterling v. Constantin (1932), 287 U.S. 378, 393, 77 L. Ed. 375.

11. See Moore v. Ogilvie (1969), 394 U.S. 814, 816.

12. See Williams v. Rhodes (1968), 393 U.S. 23, 35.

The judgment is reversed and the cause remanded for further proceedings.

No. 18388

HASTINGS, *Senior Circuit Judge*, concurring and dissenting.

I concur in that part of the majority opinion which holds that "the judgment of the district court was founded on an erroneous premise of lack of jurisdiction * * *." I further agree that the judgment must be reversed and the cause remanded. And, I would agree with the majority that the length of time remaining for possible service of a successor representative when the district court spoke on March 16, 1970 was not *de minimus*.

As best I can understand the meager information made available to us on this "quickie" appeal, this was the only question the district court considered and passed upon. This is the principal question that was argued and presented to us on this expedited appeal. If so, then the normal and reasonable course to pursue would be to reverse and remand for a hearing on the merits. There has been no such hearing to date. We do not have the views of the district court on the several important legal issues raised and the grave constitutional questions to be decided for the first time.

The majority opinion undertakes to resolve with finality the meaning and applicability of Article I, § 2, Clause 4 and Article I, § 4 of the Federal Constitution as well as Title 2, U.S.C. § 8, together with 46 Ill. Rev. Stats. § 25-7. With deference, I suggest that we are not in a position to do this now.

The majority aptly observes that the delay and short time remaining for the disposition of this appeal is not

to be charged against the district court nor to this court. And I agree with their further observation "that delay may eventually render the calling of a special election of so little use that the duty will no longer be enforceable."

I am compelled to conclude, however, that the constitutional questions, as well as the related legal issues, should first be thoroughly aired and considered by the learned district court. If an appeal therefrom is to be taken, we can then consider and treat the issues raised in an atmosphere of deliberative understanding and not on a cafeteria line of judicial service.

Such a restrained procedure may well result in rendering the enforcement of a special election moot in this case. But, that need not end the matter. As in Moore v. Ogilvie, 394 U.S. 814, 816 (1969), the mere passing of the time during which the requested mandatory injunctive remedy could be afforded here would not require the dismissal of this action. Rather, as in Moore, as long as Illinois maintains her present system of certifying elections to fill Congressional vacancies this problem is "capable of repetition, yet evading review. * * * The need for its resolution thus reflects a continuing controversy in the federal-state area" which should be resolved.

I believe this fresh constitutional matter presents the crucial question at issue. Declaratory judgments to determine such controversies should not issue without the opportunity for an informed and full consideration. This has not been afforded to either the district court or to us.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LUSTER H. JACKSON, BRENETTA M. HOWELL, JESSE D. MADISON, ALFRED L. PORTIS, RICHARD J. BARNETT, L. ROSCOE BOLER and RICHARD CRILEY, on behalf of themselves and all others similarly situated, **Plaintiffs** v. RICHARD B. OGILVIE, individually and as Governor of *the State of Illinois*, **Defendants**	Civil Action No. 69 C 2593

ORDER

This cause having come before the court upon the motion of the Plaintiffs for summary judgment and the court having considered the evidence herein as established by stipulation of the parties and by affidavits of the Plaintiffs, the court grants Plaintiffs' motion for summary judgment and finds the facts and concludes the law to be as follows:

FINDINGS OF FACT

1. The named Plaintiffs, and each of them, are adult citizens of the United States and of the State of Illinois, reside within the Sixth United States Congressional District of Illinois, and are duly qualified and registered to vote in an election to select a Representative to the United States House of Representatives from the Sixth Congressional District of Illinois.

2. The Defendant, RICHARD B. OGILVIE, is the Governor of the State of Illinois and has been so serving at all times pertinent hereto.

3. This court has jurisdiction of the subject matter of this action and of the parties hereto.

4. On August 13, 1969, the Honorable Daniel Ronan, United States Representative from the Sixth Congressional District of Illinois, died leaving a vacancy in the office of Representative to the United States House of Representatives from the Sixth Congressional District of Illinois.

5. From and after August 13, 1969, and continuing to the present date, the Governor of Illinois has refused to issue his writ of election to fill the vacancy created by the death of Congressman Ronan.

6. The earliest date upon which an election could be held to fill the Ronan vacancy is November 3, 1970.

7. A primary election was held in the Sixth Congressional District of Illinois on March 17, 1970, as a result of which two candidates from among the several declared and qualified candidates were duly nominated to stand for election to the office of Representative to the United States House of Representatives from the Sixth Congressional District of Illinois from and after January 3, 1971.

8. There is no reason to believe that any candidates other than those nominated on March 17, 1970, would enter another primary conducted for the sole purpose of filling the vacancy consisting only of the unexpired portion of Congressman Ronan's term in the 91st Congress.

9. There is no reason to believe that the results of another primary in the Sixth Congressional District would differ in any way from the results of the March 17, 1970, primary.

10. Conducting a special primary for the purpose of filling the vacancy in the Sixth Congressional District would result in substantial expense to the State of Illinois.

CONCLUSIONS OF LAW

1. Jurisdiction of this action is based upon 28 U.S.C. § 1343, 28 U.S.C. §§ 2201 and 2202, and the cause of action arises under 42 U.S.C. § 1983, Article 1, Section 2, Clause 4 of the Constitution of the United States and the Fourteenth Amendment thereto.

2. The Defendant was at all times pertinent hereto acting under color of authority of the laws of the State of Illinois.

3. The Plaintiffs have pleaded a valid class action and for purposes of this action represent all residents of the Sixth Congressional District of Illinois.

4. Pursuant to Article 1, Section 2, Clause 4 of the Constitution of the United States and the Fourteenth Amendment thereto, the people of the Sixth Congressional District of Illinois were entitled in the instance to have Defendant take the necessary steps to fill the vacancy in the office of Representative from their district to the United States House of Representatives immediately upon notification of the existence of such vacancy.

5. For the reasons explained in the foregoing findings of fact, the holding of an additional primary in the Sixth Congressional District is therefore unnecessary, and the candidates duly nominated in the March 17, 1970, primary should stand for election in the November 3, 1970, general election both to fill the vacancy remaining in the 91st Congress and the new term to be served in the 92nd Congress.

Accordingly, IT IS ORDERED, ADJUDGED AND DECREED:

1. That the refusal of Defendant, RICHARD B. OGILVIE, to issue his writ of election to fill the vacancy in the office of Representative to the United States House of Representatives from the Sixth Congressional District of Illinois in this instance was illegal and unconstitutional.

2. That the Defendant, RICHARD B. OGILVIE, his agents, servants, employees and those who act in concert of participation with him or who may be subject to his direction and control, are hereby permanently enjoined, without bond, to issue the appropriate writ of election and to take all other and additional steps as may be necessary to call, immediately, a special general election on November 3, 1970, to fill the above described vacancy, and further, to certify immediately upon election the candidate then chosen to be the duly elected Representative to the United States House of Representatives from the Sixth Congressional District of Illinois both for the remainder of the term of the 91st Congress and for the full succeeding term of office.

ENTER:

WILLIAM CAMPBELL,
Senior District Judge

Date:
June 12, 1970.
69 C 2593
Jackson, et al. v. Ogilvie

APPENDIX D

MEMORANDUM AND ORDER ON DEFENDANT'S MOTION TO DISMISS

The defendant moves to dismiss this action for want of jurisdiction. For the reasons stated, this court is of the opinion the motion should be granted.

This is a purported class action brought on behalf of the residents of the Sixth United States Congressional District of Illinois. The complaint alleges that the plaintiffs have been deprived of their constitutional right to federal legislative representation by the failure of the Governor of the State of Illinois, the defendant herein, to issue a writ of election.

The uncontroverted facts show that the Honorable Daniel Ronan was duly elected congressman from the Sixth District on November 5, 1968. Congressman Ronan was sworn, seated, and served as such until his death on August 13, 1969. On December 16, 1969, the plaintiffs filed the instant suit asking this court to mandamus the Governor to call a special election in the Sixth District.

The constitution vests in the states the power to prescribe the time, place and manner of holding elections for congressional representatives. U.S. Const. Art. 1, Sect. 4, clause 1. However, the defendant concedes that should a Governor indefinitely and arbitrarily fail or refuse to follow adequate election procedures, and thereby provide for congressional representation, then the citizens of such an unrepresented district would be deprived of fundamental civil and constitutional rights. Jurisdiction would be conferred upon this court under 28 U.S.C. § 1343.

That is not the case before this court. The undisputed facts show that a primary election for the office of congressman of the Sixth District is scheduled for March 17,

1970, and a general election for that office is scheduled for November 5, 1970. It is therefore apparent that the electoral processes are in motion. Issuance of a writ for a special election at this late day, as well as compliance with the delays inherent in the notice requirements, would result in the holding of a special election a relatively short time before the regularly scheduled election. This court does not find that the relatively short period in which the Sixth District will remain unrepresented raises any questions of denial of due process or equal protection guaranteed by the Fourteenth Amendment sufficient to invoke this court's jurisdiction.

It is therefore ordered that the motion to dismiss be, and it is hereby granted.

It is further ordered that the cause be, and it is hereby dismissed, without costs.

EDWIN A. ROBSON,

March 16, 1970

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS

No. 18388

LUSTER H. JACKSON, et al.,

Plaintiff-Appellee,

vs.

RICHARD B. OGILVIE, individually and as Governor of the State of Illinois,

Defendant-Appellant.

APPEAL FROM UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
HONORABLE EDWIN A. ROBSON, PRESIDING
APPLICATION FOR STAY PENDING
PETITION FOR CERTIORARI

Now comes defendant, Richard B. Ogilvie, individually and as Governor of the State of Illinois and pursuant to the requirements of Rule 8, Rules of the United States Court of Appeal and Rule 27, Rules of the Supreme Court of the United States and represents to and requests this Court as follows:

1. That defendant-appellants notice of appeal in this cause was filed for the sole purpose of returning the cause to this Court's jurisdiction for the consideration of this application.

2. That an application for stay of the order of the District Court for the Northern District of Illinois entered on June 12, 1970, pursuant to the opinion and mandate of this Court of May 6, 1970, was granted on June 17, 1970,

for the limited period of five days and such stay has now expired.

3. That the temporary nature of the stay granted by the District Court coupled with the fact that it was acting pursuant to the mandate of this court does demonstrate that to seek further relief by way of a stay in said District Court is not practicable and that the District Court has failed to afford the relief which this applicant requested, to wit: a stay pending petition for a writ of certiorari in the Supreme Court of the United States.

4. That the defendant will perfect his petition for certiorari from this court's opinion and mandate of May 6, 1970, and the District Court's order entered pursuant thereto to the Supreme Court of the United States.

5. That the reasons for the stay hereby requested and the facts relief upon are as follows:

(a) The opinion, mandate and order decides issues of first impression in regard to the meaning and applicability of the Federal Constitution in sections two and four of Article One. Said issues clearly invoke important questions of fundamental federal law, which have not been, but should be decided by the Supreme Court.

(b) The foregoing issues and those collateral thereto of mandamus, jurisdiction and justiciability have patently importance far beyond the particular facts and parties here involved and are of wide import involving all States of the union and all congressional constituencies therein so as to warrant the maintenance of the status quo pending appropriate ruling by the Supreme Court.

(c) A stay, if granted would not be prejudicial to the enforcement of the order which may be effectively complied with at any time prior to November 2, 1970 in that

the general election of November 3, 1970, by the terms of the order, shall also serve as a special election to fill the remaining term of vacancy from November 4, 1970 to the convening of the next Congress.

(d) The Constitutional question in regard to vacancy in the House of Representatives is a continuing question involving the entire franchised citizenry of the Republic so long as the scythe-like certainty of death reaps as inevitably in the Congress as in the house of man.

(e) As against the foregoing considerations, the immediate enforcement of the order which provides representation in one congressional district for less than two months and then, on condition subsequent that Congress be in session for all or part of such time, is of relative unimportance.

Wherefore, defendant respectfully requests an order staying the "mandatory injunctions" entered on June 12, 1970 by the United States District Court for the Northern District of Illinois pending a final determination of defendants petition for certiorari.

.....

WILLIAM J. SCOTT
Attorney General of Illinois

CERTIFICATE OF SERVICE

John Galvin hereby certifies that he is the Attorney for the defendant herein and that he served a copy of the foregoing Application for Stay upon Jonathan D. Smith, Attorney for plaintiffs, by mailing the same to him, first class, postage prepaid, to his address of record, care of the Roger Baldwin Foundation of A.C.L.U., Inc., Six South Clark Street, Suite 400, Chicago, Illinois 6603, the sixth day of July, 1970.

JOHN GALVIN

LIBRARY
SUPREME COURT, U. S.

SUP. CT. U.S.
SEP 2 1970
CLERK

No. 490

In the

Supreme Court of the United States

OCTOBER TERM, 1970

RICHARD B. OGILVIE, Individually and as Governor of the State of Illinois,

Petitioner,

vs.

LUSTER H. JACKSON, BRENETTA M. HOWELL, JESSE D. MADISON, ALFRED L. PORTIS, RICHARD J. BARNETT, L. ROSCOE BOLER, and RICHARD CRILEY, on behalf of themselves and all others similarly situated,

Respondents.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION

JOEL J. SPRAYREGEN
One First National Plaza
Chicago, Illinois 60670

JONATHAN D. SMITH
The Roger Baldwin Foundation
of ACLU, Inc.
Six South Clark Street
Chicago, Illinois 60603
(312) 726-6180

Attorneys for Respondents.

The Scheffer Press, Inc.—ANdover 3-6850

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 490

RICHARD B. OGILVIE, Individually and as Governor of the State of Illinois,

Petitioner,

vs.

LUSTER H. JACKSON, BRENETTA M. HOWELL, JESSE D. MADISON, ALFRED L. PORTIS, RICHARD J. BARNETT, L. ROSCOE BOLER, and RICHARD CRILEY, on behalf of themselves and all others similarly situated,

Respondents.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION

OPINIONS BELOW

The opinion of the District Court dismissing the cause remains unreported and appears as Appendix D to the

Petition (Petition, pp. 34-35). The opinion of the Court of Appeals for the Seventh Circuit and the dissenting opinion remain unreported and appear as Appendix B to the Petition (Petition, pp. 19-29).

JURISDICTION

The jurisdictional requisites are adequately stated in the Petition.

QUESTIONS PRESENTED

1. May a governor refuse to issue a writ of election to fill a vacancy in the United States House of Representatives where another such vacancy which occurred eighty days earlier was filled and where the vacancy would not otherwise be filled for more than a year and a quarter?

2. Do federal district courts have original subject matter jurisdiction:

   (a) to entertain causes alleging deprivations of constitutional rights pursuant to 28 U.S.C. § 1343 and 42 U.S.C. § 1983 without regard to antecedent judicial treatment of similar claims?

   (b) to issue mandatory injunctions directed to state officials to correct such deprivations?

3. Are claims of deprivations of constitutional rights in election matters justiciable?

STATEMENT OF THE CASE

Respondents, plaintiffs below, filed this suit in equity as a class action on behalf of themselves and all other qualified electors of the Sixth United States Congressional District of Illinois against Petitioner, the Governor of the

State of Illinois, alleging jurisdiction pursuant to 28 U.S.C. §§ 1343, 2201 and 2202 and asserting that their claim arose under 42 U.S.C. §§ 1983 and 1988 and Article 1, Section 2, Clause 4 of the Constitution of the United States and the Ninth and Fourteenth Amendments thereto. Respondents sought a declaration by the court that Petitioner's refusal to fill the vacancy existing in the office of Representative to the United States House of Representatives from their district was unconstitutional and also sought a mandatory injunction compelling Petitioner to fill the vacancy.

The factual basis for the action as alleged in the complaint and as stipulated by Petitioner is as follows. (Plaintiffs' Motion to Reinstate Request for Admission and Order of District Court of May 14, 1970) On November 5, 1968, Donald Rumsfeld and Daniel Ronan were duly elected to the office of Representative to the United States House of Representatives from the Thirteenth and Sixth Congressional Districts of Illinois, respectively. Both men were sworn, seated and began to serve in the House of Representatives. On May 25, 1969, Representative Rumsfeld resigned, and Petitioner issued his writ of election on May 27, 1969, calling a special election to be held November 25, 1969 to fill the vacancy. At that time, Philip Crane was duly elected to complete the unexpired Rumsfeld term. He was sworn, seated and is now serving. However, when Representative Ronan died on August 13, 1969, Petitioner took no action to fill the vacancy in the Sixth Congressional District office.

The District Court dismissed the cause on March 16, 1970. (Petition, Appendix D, pp. 34-35) Respondents appealed to the Court of Appeals for the Seventh Circuit which reversed the order of the District Court and remanded the cause on May 6, 1970. (Petition, Appendix

B, pp. 19-29) Upon remand, Respondents moved for summary judgment relying upon their affidavits and Petitioner's admission of all facts pleaded in the complaint. (Plaintiffs' Motion for Summary Judgment, filed May 25, 1970) The District Court granted summary judgment for Respondents (Order of District Court of May 25, 1970) and entered its final order of judgment. (Petition, Appendix C, pp. 30-33) Petitioner then filed his notice of appeal on June 17, 1970 in the District Court. He then requested from the District Court a stay of its final order. (Defendant's Application for Stay, filed June 17, 1970) The District Court granted a five day stay of the order. (Order of District Court of June 17, 1970) Petitioner then moved for a further stay of the order in the Court of Appeals (Petition, Appendix E, pp. 36-38) which was denied. (Order of Court of Appeals of July 20, 1970) Petitioner's appeal was docketed July 14, 1970 as Cause No. 18598 in the Court of Appeals for the Seventh Circuit. Petitioner has failed to further prosecute his appeal in the Court of Appeals, and the time for filing his brief in the Court of Appeals has expired pursuant to Rule 31(a), FED. R. APP. PROC.

ARGUMENT

It appears on the face of the Record herein that Petitioner is attempting to obtain a writ of certiorari for review of an interlocutory order of the Court of Appeals which reversed an order of the trial court dismissing the cause and remanded it for trial. It is clear that the standard established by this Court governing the granting of certiorari is that such interlocutory orders will not be reviewed except in extraordinary cases. *American Constr. Co.* v. *Jacksonville, T.&K.W. Ry.*, 148 U.S. 372, 384 (1893); *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & A. R.R.*, 389 U.S. 327 (1967) (per curiam). Respondents know of no extraordinary reason for abrogating the final judgment standard in this instance. Petitioner's method of seeking certiorari has improperly brought to the Court a record including matters which transpired much later than the interlocutory order of the Court of Appeals for which he seeks review. Respondents submit that Petitioner's failure to perfect his appeal in the Court of Appeals from the final order of the District Court in this cause and the procedural defects evident herein are sufficient reasons for denial of the Petition.

In addition, there are no compelling reasons for granting the writ of certiorari herein. As Judge Hastings noted in his partial dissent in the Court of Appeals, the construction of Article 1, Section 2, Clause 4 of the Constitution of the United States does present "fresh constitutional matter." However, the republic has existed for one hundred eighty-three years under the Constitution without the

meaning of that clause ever before having been questioned in a federal court. Respondents respectfully submit that the lack of urgency revealed by that heretofore unbroken silence and the lack of conflict among the federal circuits deriving therefrom strongly militate against granting of the writ. In addition, the decision of the Court of Appeals is clearly correct, and, except for the single original issue discussed above, every conclusion of the Court of Appeals is consistent with and based upon decisions of this Court.

The Governor's Refusal to Issue a Writ of Election was Clearly Unconstitutional.

Article I, Section 2, Clause 4 of the Constitution of the United States provides, "When vacancies happen in the Representation from any State, the Executive Authority thereof *shall* issue Writs of Election to fill such vacancies." [Emphasis added]. No federal court has ever directly construed this clause except in the instant case. However, the Court of Appeals for the Seventh Circuit found that the foregoing constitutional language conferred a duty upon the Petitioner stating, "The language is mandatory according to the ordinary meaning of its terms. We find no persuasive reason for reading it in a directory sense." (Petition, Appendix B, p. 23). The appellate court's interpretive method in reaching its conclusion is consistent with decisions of this Court. *Sturges* v. *Crowinshield,* 17 U.S. (4 Wheat.) 122, 202-03 (1819); *United States* v. *Sprague,* 282 U.S. 716, 731-32 (1931); *Escoe* v. *Zerbst,* 295 U.S. 490, 493-94 (1935); *Wright* v. *United States,* 302 U.S. 583, 588 (1937). It is also consistent with this Court's determination of the intent of the whole of Article I, Section 2 of the Constitution. *Wesberry* v. *Sanders,* 376 U.S. 1, 13-17 (1964).

The Respondents' claim that they are being denied their right to equal protection of the law contrary to the Fourteenth Amendment to the Constitution is also consistent with many decisions of this Court which provide additional support for the Seventh Circuit's decision herein. *Gray* v. *Sanders*, 372 U.S. 368 (1963); *Reynolds* v. *Sims*, 377 U.S. 533 (1964); *Carrington* v. *Rash*, 380 U.S. 89 (1965); *Williams* v. *Rhodes*, 393 U.S. 23 (1968); *Kirkpatrick* v. *Preisler*, 394 U.S. 526 (1969); *Wells* v. *Rockefeller*, 394 U.S. 542 (1969); *Hadley* v. *Junior College Dist.*, 397 U.S. 50 (1970).

The District Court Clearly Had Original Jurisdiction of the Subject Matter of This Action and Could Grant the Relief Requested.

The Court of Appeals expressly found that the District Court had jurisdiction of the subject matter of this action (Petition, Appendix B, p. 22), rejecting, *sub silentio*, Petitioner's argument that jurisdiction pursuant to 28 U.S.C. § 1343 is limited to instances where there exists an express, antecedent, judicial recognition of the right asserted. It is very clear from the express language of 28 U.S.C. § 1343 and 42 U.S.C. § 1983 that original jurisdiction of the subject matter lay in the District Court, and the Court of Appeals could not have held otherwise pursuant to this Court's opinions in many cases. *See, e.g., Ex parte Virginia*, 100 U.S. 339, 346-47 (1879); *Home Tel. & Tel. Co.* v. *Los Angeles*, 227 U.S. 278, 287-96 (1913); *Monroe* v. *Pape*, 365 U.S. 167, 171-72 (1961); *Baker* v. *Carr*, 369 U.S. 186, 199, 201 (1962). The lack of merit of the "antecedent recognition" argument of Petitioner is amply demonstrated by a comparison of *Minersville School Dist.* v. *Gobitis*, 310 U.S. 586 (1940), with *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943), where the *Gobitis* finding that an asserted constitutional right was non-

existent did not bar jurisdiction under 28 U.S.C. § 1343 for subsequent litigation which overruled *Gobitis*.

The Court of Appeals also expressly rejected Petitioner's argument that the District Court had no power to mandatorily enjoin him to do his constitutional duty. (Petition, Appendix B, pp. 26-27) This is entirely consistent with the decisions of this Court which the Court of Appeals cited as authority for that determination, *Sterling* v. *Constantin*, 287 U.S. 378, 393 (1932), and *Williams* v. *Rhodes*, 393 U.S. 23, 35 (1968), and others. *See, e.g., Walkley* v. *Muscatine*, 73 U.S. (6 Wall.) 481, 483 (1867); *Bell* v. *Hood*, 327 U.S. 678, 684 (1946); *United States* v. *Oregon Medical Soc'y*, 343 U.S. 326, 333 (1952); *see also*, 28 U.S.C. § 1651(a).

Deprivations of Constitutional Rights in Election Matters are Clearly Justiciable.

The finding of the Court of Appeals that the instant claim is justiciable and is not a "political question" (Petition, Appendix B, p. 22) is compelled by *Baker* v. *Carr*, 369 U.S. 186 (1962). *Baker*, which dealt extensively with the problem of justiciability, found that the political question doctrine bars consideration only of questions of foreign relations (369 U.S. at 211), of dates of duration of hostilities (369 U.S. at 213), of the formal validity of enactments (369 U.S. at 214), of the status of Indian tribes (369 U.S. at 215) and of the republican form of government guarantee (369 U.S. at 218).

CONCLUSION

The Petition seeks review of an interlocutory order in such a manner that the issues are not properly presented for review. The opinion of the Seventh Circuit was clearly correct and consistent with relevant decisions of this Court. There is no conflict among the circuits. No other compelling reason exists for granting a writ of certiorari herein. It is respectfully submitted, therefore, that the Petition For Writ of Certiorari should be denied.

Respectfully submitted,

JOEL J. SPRAYREGEN
One First National Plaza
Chicago, Illinois 60670

JONATHAN D. SMITH
The Roger Baldwin Foundation
of ACLU, Inc.
Six South Clark Street
Chicago, Illinois 60603
(312) 726-6180
Attorneys for Respondents

LIBRARY
SUPREME COURT, U. S.

FILED
SEP 25 1970
E. ROBERT SEAVER, CLER

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 490

RICHARD B. OGILVIE, Individually and as Governor of the State of Illinois,

Petitioner,

v.

LESTER H. JACKSON, BRENETTA M. HOWELL, JESSIE M. MADISON, ALFRED L. PORTIS, RICHARD J. BARNETT, L. ROSCOE BOLER, and RICHARD CRILEY, on behalf of themselves and all others similarly situated,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITIONER'S REPLY BRIEF

WILLIAM J. SCOTT,
Attorney General of the State of Illinois,
160 North La Salle Street, Suite 900,
Chicago, Illinois 60601 (312/793-3500),

JOHN GALVIN,
Assistant Attorney General,

Counsel for Petitioner.

Printed by Authority of the State of Illinois 365

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 490

RICHARD B. OGILVIE, Individually and as Governor of the State of Illinois,

Petitioner,

v.

LESTER H. JACKSON, BRENETTA M. HOWELL, JESSIE M. MADISON, ALFRED L. PORTIS, RICHARD J. BARNETT, L. ROSCOE BOLER, and RICHARD CRILEY, on behalf of themselves and all others similarly situated,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITIONER'S REPLY BRIEF

This Brief is addressed point by point to those arguments first raised in the Brief in Opposition.

I.

New Argument raised under "Questions Presented."

Respondents' Question No. 1 would assume that the fundamental issues in this case have somehow been determined. Those issues concern a) the constitutional duty of State executive authority when vacancies happen in the House of Representatives, b) the constitutional rights of the electors, and c) the jurisdiction of the federal courts. The parties agree that the involved rights and duties have never been judicially declared. To focus upon the governor's failure to issue a writ of election, as respondents do, obscures momentous fundamental issues of objective rights and duties by a misdirected subjective argument. It is the Petitioner's position that State Executive authority enjoys a constitutional discretion in the matter. Consistent with that position, the manner in which a discretion was exercised on a prior occasion is irrelevant.

Respondents' Question No. 2 (b) begs another essential issue in the case. It is conceded that federal district courts have power to issue mandatory injunctions against state officials who work deprivation of secured rights under color of law. That proposition is not in issue here. Here the real and actual issue is the existence, in district courts of limited jurisdiction, as defined by Congress, of *mandamus* power as to which certain conditions precedent are clearly required; being a) a duty in the state official, and b) a clear legal right in the relator to have the duty performed at the time application for the writ is made. (*U.S. ex rel.* v. *Lamont*, 155 U.S. 308).

In the context of this case, Respondents' Question No. 3 is so general as to be insignificant. This is simply not a

reapportionment case. This is simply not a voting rights case. And, only indirectly, can it be described in minor part as an election matter.

I. I

New Argument raised under "Statement of the Case."

We briefly elaborate on our contention that Petitioner's issuance of a writ of election in the instance of a prior vacancy in the House of Representatives is not relevant to this case. Had Petitioner negatively exercised his discretion on the resignation of Representative Rumsfeld, such circumstance would give no greater force to Respondents' theories. Where he affirmatively exercised his discretion, it should not, in logic, prejudice petitioner's theories. What was done in regard to the prior vacancy is beyond the present issues of jurisdiction, justiciability and federalism.

Petitioner's appeal to the Court of Appeals for the Seventh Circuit was for "*the sole purpose of returning the cause to that Court's jurisdiction for the consideration of" the Application for Stay* (See Petition, Appendix E paragraph one, page 36.) pursuant to Rule 27 of Rules of the Supreme Court of the United States.

> Rule 27. "Applications pursuant to 28 U.S.C. § 2101 (f) to a justice of this court will not normally be entertained unless application for a stay has first been made to a judge of the court rendering the decision sought to be reviewed, or to such court. . . ."

Action by Petitioner to meet a condition precedent imposed by rule of this Court should not prejudice his petition properly and timely filed under 28 U.S.C. § 1254 (1). Petitioner's Application For Stay of Mandate of United

States Court of Appeals is filed simultaneously with this memorandum.

III.

New Argument Raised Under "Argument."

The mandate of the Court of Appeals is merely interlocutory in form. It is final in subtance. This case is ripe for review. *Accordingly, Brotherhood of Locomotive Firemen and Engineman* v. *Bangor & A.R.R.* 389 *U.S.* 327 (1967) (*per curiam*) *is distinguishable.* The fact that all orders below are now final is also a distinction.

In *Hamilton-Brown Shoe Co.* v. *Wolf Bros. Co.*, 240 U.S. 251, the first petition for *certiorari* was denied before trial court action on the mandate of the Court of Appeals. The opinion of Mr. Justice Pitney indicates that *certiorari* was denied initially for lack of a substantial question.

> "The decree that was sought to be reviewed by certiorari at complainant's instance was not a final one, a fact that of itself alone furnished sufficient ground for the denial of the application, besides which, it appears, by reference to our files, that the application was opposed by the present petitioner upon the ground that the case, however important to the parties, involved no question of public interest and general importance, nor any conflict between the decisions of State and Federal courts, or between those of Federal courts of different circuits."

This case is postured differently. The district court has acted on the mandate and it is a practical futility to seek review in the Court of Appeals of the very issues that Court decided against this petitioner.

Respondents acknowledge that this case presents a "fresh constitutional matter." They assert, at the same

time, that such matter coming before this Court after 183 years under the Constitution thereby demonstrates a lack of urgency which militates against granting the writ. The argument is that a "fresh constitutional matter" is not to be reviewed by this Court because it is fresh and it suggests an unwritten "statute of limitations" on the judicial Power of the United States. These propositions may be dismissed as absurdities. Petitioner submits that Article I, Section 2, Clause 4 has never before been questioned because of longstanding recognition by Congress of the principle of federalism which has vested discretion in state executive authority, coupled with recognition by the courts of lack of jurisdiction and want of justiciability. The advent, after 183 years, of this confrontation of state executive authority by the federal judicial power proclaims an urgent necessity to grant the writ.

We now turn to Respondents' facile but fallacious assertions that: 1. The Governor's refusal to issue a writ of election was clearly unconstitutional; 2. The District Court clearly had original jurisdiction and could grant relief; and 3. The subject matter is justiciable.

1. The Constitutionality of Governor's Refusal To Issue A Writ Of Election.

A recurrence to the fundamental principle of federalism gives cogent support to the Governor's exercise of discretion and endorses his conduct as constitutional. Papers No. 52 through No. 59 of the Federalist are a detailed discussion of the House of Representatives. They impliedly support virtual representation in the event of vacancy. In brief, the fact that biennial elections are unalterably fixed and thus secure the liberty of the people, the fact that the primary purpose and intent was to provide the national

government with "the means of its own preservation," the fact that more frequent elections were regarded as undesirable from the viewpoint of distances to travel and from the viewpoint of investigation and annulment of spurious election—not only support virtual representation but also give a perspective to Article 2, Section 2, Clause 4 which the Court of Appeals clearly did not consider. That perspective is this—that the mandate of the word "shall" as used in the phrase—"the Executive Authority thereof shall issue Writs of Election—is not an imperative addressed to the immediacy of filling a vacancy, but rather to the exclusive manner of filling a vacancy, (*i.e.* by election), when and if filled.

Mr. Justice Story's Commentaries on the Constitution refute respondents' glib conclusion that the refusal to issue a writ of election was clearly unconstitutional.

> "§ 684. The next clause of the second section of the first article is: 'When vacancies happen in the representation of any State, the executive authority thereof shall issue writs of election to fill such vacancies.
>
> "§ 685. The propriety of adopting this clause does not seem to have furnished any matter of discussion, either in or out of the convention. It was obvious that the power ought to reside somewhere; and must be exercised by the State or national government, or some department thereof. The friends of State powers would naturally rest satisfied with leaving it with the State executive; and the friends of the national government would acquiesce in that arrangement, if other constitutional provisions existed sufficient to preserve its due execution. *The provision, as it stands, has the strong recommendation of public convenience, and facile adaptation to the particular local circumstances of each state. Any general regulation would have worked with some inequality.*" [Emphasis added.]

It is clear then that this clause is not a general regulation and that, in having regard of public convenience and particular local circumstances of each state, it contemplates a discretion in the state executive wherein the power resides. The constitutional provision which preserves its due (*i.e.* proper, suitable and rightful and not necessarily immediate) execution is Section 4 of Article I. In regard to this section Mr. Justice Storey comments as follows:

> "§ 814. The first clause of the fourth section of the first article is as follows: "The times, places, and manner of holding elections for senators and representatives shall be prescribed in each State by the legislature thereof. But the Congress may, at any time, by law, make or alter such regulations, except as to the place of choosing senators."
>
> "§ 815. This clause does not appear to have attracted much attention, or to have encountered much opposition in the convention, at least so far as can be gathered from the journal of that body. But it was afterwards assailed by the opponents of the Constitution, both in and out of the State conventions, with uncommon zeal and virulence. The objection was not to that part of the clause which vests in the State legislatures the power of prescribing the times, places, and manner of holding elections; for so far it was a surrender of power to the State governments. But it was to the superintending power of Congress to make or alter such regulations. It was said that such a superintending power would be dangerous to the liberties of the people and to a just exercise of their privileges in elections. Congress might prescribe the times of elections so unreasonably as to prevent the attendance of the electors, or the place at so inconvenient a distance from the body of the electors as to prevent a due exercise of the right of choice. And Congress might contrive the *manner* of holding elec-

tions so as to exclude all but their own favorites from office. They might modify the right of election as they should please; they might regulate the number of votes by the quantity of property, without involving any repugnancy to the Constitution. These and other suggestions of a similar nature, calculated to spread terror and alarm among the people, were dwelt on with peculiar emphasis."

"§ 816. In answer to all such reasoning, it was urged that there was not a single article in the whole system more completely defensible. Its propriety rested upon this plain proposition, that every government ought to contain in itself the means of its own preservation. If, in the Constitution, there were some departures from this principle, (as it might be admitted there were,) they were matters of regret, and dictated by a controlling moral or political necessity, and they ought not to be extended. It was obviously impracticable to frame and insert in the Constitution an election law which would be applicable to all possible changes in the situation of the country, and convenient for all the States. *A discretionary power over elections must be rested somewhere.* There seemed but three ways in which it could be reasonably organized. It might be lodged either wholly in the national legislature, or wholly in the State legislatures, or primarily in the latter and ultimately in the former. The last was the mode adopted by the convention. The regulation of elections is submitted, in the first instance, to the local governments, which, in ordinary cases and when no improper views prevail, may both conveniently and satisfactorily be by them exercised. But in extraordinary circumstances, the power is reserved to the national government, so that it may not be abused, and thus hazard the safety and permanence of the Union."

Reason requires that the biennial election clause; the vacancy clause and the election provisions of Article I,—

all be read together. Upon such reading these conclusions appear inescapable as to the accommodating federal plan.

1. Fixed biennial elections secure the safety and permanence of the Union. Interim vacancy elections are not essential to this end.

2. The holding of elections is placed primarily within the province of the States.

3. As an additional safeguard, Congress, *not the federal judiciary*, has a reserved power to regulate the holding of elections.

4. This reserved power in Congress is to be exercised only in extraordinary circumstances.

It further appears that in regard to interim vacancies in the House of Representatives such extraordinary circumstances as hazard the safety and permanence of the Union or the right of the people to choose their representatives have never happened so as to require affirmative regulation by Congress.

We are not concerned here with congressional district mal-apportionment and consequent vote-diluting discrimination as in *Wesberry* v. *Sanders*, 376 U.S. 1. We seriously doubt that the aspects of the First Article in issue in this case were within the contemplation of Mr. Justice Black in presenting the majority opinion and a review of the history of the Great Compromise. The issues here are most worthy of distinct consideration regardless of the "one person, one vote" principle of *Gray* v. *Sanders*, 372 U.S. 368, intrinsic to the other cases cited by respondents because there is a generic difference between the right to vote and the right to hold an election.

2. The District Court's Jurisdiction And Power To Grant The Relief Requested.

It is far from clear and, indeed, petitioner denies that the express language of 28 U.S.C. section 1343 (jurisdiction) and 42 U.S.C. 1983 (cause of action) confers district court jurisdiction without regard to an express or notorious, antecedent judicial recognition of the right asserted. The fact that the Court of Appeals rejected our argument, *sub silencio*, is some evidence of doubt as to jurisdiction. The Court of Appeals based its finding of jurisdiction on analogy to *Wesberry* v. *Sanders*. We have heretofore demonstrated the deficiencies of such analogy. *Monroe* v. *Pape*, 365 U.S. 167, properly based jurisdiction on antecedent fundamental 4th and 14th Amendment rights against unreasonable search and seizure. *Baker* v. *Carr*, 369 U.S. 186, opened the jurisdictional Pandora's box which we now seek to close.

Baker v. *Carr* was initially submitted under 28 U.S.C. 1343(3) to the United States District Court for the Middle District of Tennessee, and there was dismissed for want of jurisdiction of the subject matter and also on the ground that no claim was stated upon which relief could be granted (179 F. Supp. 824). The Supreme Court over ruled on these points. The eight Justices participating in the decision filed six distinct opinions. Justice Brennan discussed the question of jurisdiction. His views must be taken as the opinion of the Court on the subject although it appears that his Brethren gave limited attention to the subject. Justice Brennan did recognize that a cause presented must be described in a jurisdictional statute (p. 198) and held the complaint "within 28 U.S.C. 1343." He recognized the antecedent force of the phrase authorized by law. (see footnote 18 p. 200 specifically referring to 42 U.S.C. 1983).

He cited the following cases in support of District Court jurisdiction under 28 U.S.C. 1343(3) *Douglas* v. *Jeannette*, 319 U.S. 157; *Stefanelli* v. *Minard*, 342 U.S. 117; *Nixon* v. *Herndon*, 273 U.S. 536; *Nixon* v. *Condon*, 286 U.S. 73; *Snowden* v. *Hughes*, 321 U.S. 1; *Smith* v. *Allwright*, 321 U.S. 649; *Monroe* v. *Pape*, 365 U.S. 167; *Egan* v. *Aurora*, 365 U.S. 514.

Douglas v. *Jeannetti* is founded on express First Amendment rights of freedom of speech, press and religion; *Stefanelli*—unlawful search, a fundamental Fourth Amendment right; *Nixon* v. *Herndon*—the Fifteenth Amendment right to vote; *Nixon* v. *Condon*—the same; *Smith*—the same; *Monroe*—illegal search and arrest contra the Fourth Amendment; and *Egan*—speech and assembly. *Snowden* stands apart, judgment therein was "*affirmed for failure to state a cause of action within the jurisdiction of* the District Court."

The other cases cited in reliance by Justice Brennan are *Wood* v. *Broom*, 287 U.S. 1; *Mahan* v. *Hume*, 287 U.S. 575; *Colegrove* v. *Green*, 328 U.S. 549; *Cook* v. *Fortson*, 329 U.S. 675; *Turman* v. *Duckworth*, ibid; *Colegrove* v. *Barrett*, 330 U.S. 804; *Tedesco* v. *Board of Supervisors*, 339 U.S. 940; *Remney* v. *Smith*, 342 U.S. 916; *Cox* v. *Peters*, 342 U.S. 936; *Anderson* v. *Jordan*, 343 U.S. 912; *Kidd* v. *McCanless*, 352 U.S. 920; *Radford* v. *Gary*, 352 U.S. 991; *Hartsfield* v. *Sloan*, 357 U.S. 916; *Matthews* v. *Handley*, 361 U.S. 127.

Wood v. *Broom*: The opinion is silent as to jurisdiction but the argument indicates that *an amount in controversy was alleged*. The case was summarily reversed with direction to dismiss.

Mahan v. *Hume*: Is a per curiam decision following *Wood* v. *Broom* also totally silent as to jurisdiction.

Colegrove v. *Green*: Supreme Court affirmed dismissal below by a three-judge court. The opinion of the district court three judges 64 F. Supp. 632 does not respond directly to the defendant's motion to jurisdiction, it merely states a paradox without suggesting its resolution (p 635).

Cook v. *Fortson and Turman*: Are per curiam decisions, quite silent as to jurisdiction.

Colegrove v. *Barrett*: Another concurrence, per curiam, with a dismissal below for want of a substantial federal question.

Tedesco: Another per curiam decision; "The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

Remmey: The same as above.

Cox: the same as above.

Anderson: The same as above.

Kidd: The same as above.

Radford: The same as above.

Hartsfield: This citation is an order, entirely cryptic as to our subject matter.

Matthews: Another decision per curiam, quite silent as to jurisdiction.

Justice Brennan speaking of these cases recognized that they were decided in summary per curiam statements (p. 202) making the doubtful point: "None was dismissed for want of jurisdiction of the subject matter." Since these cases were, in fact, consistently dismissed for want of a substantial federal question, his statement, we submit, is essentially an exercise in semantics.

The Justice concludes his dissertation on Jurisdiction of The Subject Matter by relying on the implications that

there is subject matter jurisdiction found in *MacDougall* v. *Green*, 335 U.S. 281 and *South* v. *Peters*, 339 U.S. 276.

In *MacDougall* the district court expressly found want jurisdiction and denied an injunction, 80 F. Supp. 725, and that judgment was affirmed.

In *South* a dismissal was also affirmed. Thus it would appear that the inferences drawn by the Justice are gratuitous.

We submit that the foregoing disposes of *Baker* v. *Carr* as authority against our thesis and demonstrates that in that case, as in *Brown* v. *Board of Education*, jurisdiction under 28 U.S.C. 1343(3) was dogmatically found out of zeal to reach the issues without delay. Certainly, our present thesis was neither presented nor considered and in regard to the seven cases specifically cited in support of 1343(3) jurisdiction, they give credit to our view that an established right in esse must be found.

We regret having to include in this memorandum the foregoing material more appropriate to a brief on the merits but submit that it was incumbent on us to reply, at least in part, to respondents' unequivocal declaration that "the lack of merit of the 'antecedent recognition' argument of petitioner is amply demonstrated."

Respondents compare *Minersville School District* v. *Gobitis*, 310 U.S. 586 with *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 to demonstrate lack of merit in our jurisdiction argument. It is true that Gobitis ruled that first amendment rights of the free exercise of religion did not control a state requirement that the national flag be saluted regardless of religious convictions and that Barnette reversed that rule. The former decision did not bar jurisdiction in the latter case which sub-

stantially asserted a non-existent right. But there is no indication in the decisions in *West Virginia* v. *Barnette* 319 U.S. 624 that jurisdiction was challenged. Indeed in turning to *Barnette* v. *West Virginia*, 47 F. Supp. 251, we find on page 252, that "*no question is raised as to jurisdiction*" *and that original jurisdiction was founded on the then requisite amount in controversy.* (Emphasis added).

There is dicta by the three judge court to the effect that there is jurisdiction irrespective of the amount involved. But the fact remains that no question was raised as to jurisdiction under color of law and the court did not examine the issue. We believe that, absent the requisite amount in controversy, jurisdiction may have been successfully challenged by our "antecedent recognition" theory because the consequences of dismissal for want of jurisdiction would not have been either untoward or severe on plaintiff. Plaintiff would have filed a new suit in state court, prosecuted state appeal and, upon a highest state court ruling upholding the validity of the statute, prosecuted appeal to this Court as a matter of right. The outcome would have been the same. There would have been a delay of vindication.

Such delay attributable to statutory jurisdictional requirements in cases involving clear adverse precedent is not unwarranted and is further justified by the benefit of a clear definition of jurisdiction. Original district court jurisdiction as now *undefined* invites any and all cases where vague allegations of denial of due process or equal protection may be made.

In regard to the remedy, it is noted that the cases cited by respondents with the exception of *Williams* v. *Rhodes*, 393 U.S. 23, do not involve affirmative orders to state

executive authority in the nature of mandamus compelling affirmative action.

Sterling v. *Constantine*, 287 U.S. 378 enjoined the Governor of Texas from enforcing orders limiting production of oil. This is not, of course, mandamus.

Walkley v. *Muscatine*, 73 U.S. 481 is pure dicta on the subject of mandamus since it affirmed a dismissal below without affording a remedy.

Bell v. *Hood*, 327 U.S. 678 was an action against *federal agents* of the F.B.I. and by dicta speaks only of restraining state officers from doing what the 14th Amendment forbids the state to do (page 684). Again, it is not mandamus.

United States v. *Oregon Medical Society*, 343 U.S. 326 obviously does not involve a state officer or agency.

As to *Williams* v. *Rhodes*, 393 U.S. 23, the preliminary ruling on a motion for temporary injunction made by Mr. Justice Stewart, 89 S. Ct. 1 et seq., clearly shows that the state executive authority did not question the power of the court to grant the relief sought. We have for some time been intrigued by the cryptic language of Mr. Justice Stewart, viz.

> "The parties have not questioned my power to grant the relief sought, but I believe that such power should be used sparingly and only in the most critical and exigent circumstances. With that in mind, I have consulted with every member of the court, except Mr. Justice Douglas, who is unavailable, and am authorized to state that all of them are of the opinion that an early hearing and a prompt and effective decision of this appeal are highly desirable."

We do agree, if such be the meaning of the language above, that power that is not questioned, if non-existent,

should indeed be used sparingly and only in the most critical and exigent circumstances. We note that Mr. Justice Stewart did not comment on the views of his brethren as to the exercise of the power and that "counsel (are) agreed that in the absence of a temporary order by me, at this time, difficult if not insurmountable practical problems in the preparation of the ballot would result."

In all due respect, here petitioner does not, Barkus-like, agree. We are unwilling to do so and seek an explicit ruling on the validity of the affirmative remedy mandated and used below.

3. The Subject Matter Is Clearly Justiciable?

Beyond the specific categories of non-justiciable subject matter enumerated by respondents; *Baker v. Carr*, 369 U.S. 186 (1962) pronounces a number of formulations which if inextricable from a case at bar indicate the propriety of dismissal for non-justiciability on the ground of a political question's presence. These formulations are enumerated (369 U.S. at 217) as follows:

1. A textually demonstrable constitutional commitment of the issue to a coordinate political department;

2. or, a lack of judicially discoverable and manageable standards for resolving it;

3. or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion;

4. or the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government;

5. or an unusual need for unquestioning adherence to a political decision already made;

6. or, the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

By these criteria, we can say—"Stand Up! Hats off! We are again, at long last, in the presence of that rare thing, a true and palpable political question."

CONCLUSION

The issues are properly presented for review. The opinion of the Court of Appeals in this case of "fresh constitutional matter," is not correct. We respectfully ask that the Petition for Writ of Certiorari be granted.

WILLIAM J. SCOTT,
Attorney General of the State of Illinois,
160 North La Salle Street,
Chicago, Illinois 60601 (793-3500),

JOHN GALVIN,
Assistant Attorney General,
Counsel for Petitioner.